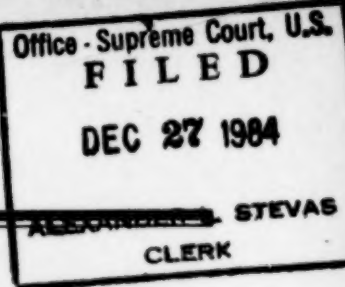


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No. 84-476



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT McDONALD,
Petitioner,

v.

DAVID I. SMITH,
Respondent.

Certiorari to the United States Court of Appeals
for the Fourth Circuit

JOINT APPENDIX

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Counsel for Petitioner

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1984
CERTIORARI GRANTED NOVEMBER 26, 1984

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RELEVANT DOCKET ENTRIES

1981

July 24, 1981	Complaint (with Exhibits A and B) (filed in District Court With Petition For Removal on August 25, 1981)
October 2, 1981	Plaintiff's demand for jury trial

1982

July 9, 1982	Defendant's Answer
July 9, 1982	Defendant's Motion For Judgment on The Pleadings pursuant to Rule 12(c)
July 9, 1982	Defendant's Memorandum In Support of Motion for Judgment on the Plead- ings
August 19, 1982	Plaintiff's Brief In Opposition to De- fendant's Motion For Judgment on the Pleadings
October 28, 1982	Defendant's Reply to Plaintiff's Brief In Opposition To Defendant's Motion For Judgment on the Pleadings

1983

February 4, 1983	Transcript of Hearing on Defendant's Motion For Judgment on the Pleadings (filed August 15, 1983)
April 28, 1983	Memorandum Opinion denying Plain- tiff's Motion For Judgment on the Pleadings
April 28, 1983	Order denying Plaintiff's Motion For Judgment on the Pleadings
May 18, 1983	Defendant's Notice of Appeal to the Fourth Circuit
July 29, 1983	Appellant's Brief and Joint Appendix
August 30, 1983	Appellee's Motion to Dismiss Appeal

August 31, 1983	Appellee's Brief
September 31, 1983	Appellant's Reply Brief
June 28, 1983	Opinion of the Fourth Circuit
June 28, 1983	Judgment of the Fourth Circuit affirm- ing the District Court's Order of April 28, 1983

COMPLAINT, WITH EXHIBITS A AND B
(July 24, 1981)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR DIVISION

81 CVS 1088
NORTH CAROLINA
ALAMANCE COUNTY

DAVID I. SMITH,

Plaintiff,

—vs—

ROBERT McDONALD,

Defendant.

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1.

That the plaintiff is a citizen and resident of Alamance County, North Carolina.

2.

That the defendant is a citizen and resident of Alamance County, North Carolina.

3.

That the plaintiff is an attorney and counselor at law, having been duly licensed by the State of North Carolina to practice law in the various courts of said state in September of 1964, and that at all times herein complained

of the plaintiff was practicing his profession as an attorney at law in Alamance County and surrounding areas.

4.

That subsequent to the 1980 General Election it was known there would be a vacancy for the office of United States Attorney for the United States District Court, Middle District of North Carolina. That plaintiff, individually and by and through numerous friends and associates, made application for this position and plaintiff is informed, believes and so alleges that he was being seriously considered for the position prior to the malicious acts and conduct of the defendant as herein set forth.

5.

That on or about December 1, 1981, the defendant, wilfully and maliciously and with evil and wicked intent wrote a letter addressed to "The Honorable Ronald Reagan, President-Elect of the United States, 901 South Highland Street, Arlington, Virginia 22204" with copies to Edwin Meese, Chairman, Transition Team, Barry M. Goldwater, Jr. (R), U.S. House of Representatives and Jack Kemp (R), U.S. House of Representatives and to the office and staff of U.S. Senator Jesse Helms and Congressman W. E. Johnston. That said letter was duly mailed by the defendant to the above named persons and was received and read by them and others. That said letter contained false, slanderous, libelous, inflammatory and derogatory statements and allegations of and concerning the plaintiff. That the defendant knew that the statements were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney and counselor at law, and for the further express and malicious purpose of harming and damaging the plaintiff's application and changes [sic] to be appointed as the United States Attorney for the Middle District of

North Carolina. A copy of said letter being attached hereto and marked Plaintiff's Exhibit "A" and incorporated herein by reference.

6.

That on or about the 13th day of February, 1981, the defendant, wilfully and maliciously, and with evil and wicked intent wrote a letter addressed to "The Honorable Ronald Reagan, President of the United States, White House, Washington, D.C." with copies to Edwin Meese, Chief Counselor to the President; Barry Goldwater, Jr., Representative, California; Jesse Helms, Senator, North Carolina and William Webster, Director, F.B.I. and to the office and staff of Congressman W. E. Johnston. That said letter was duly mailed by the defendant to the above named persons and was received and read by them and others. That said letter contained false, slanderous, libelous, inflammatory and derogatory statements and allegations of and concerning the plaintiff. That the defendant knew that the statements were false and untrue and that same were made with the specific and malicious intent to harm the plaintiff in his personal life and in his profession as an attorney and counselor at law, and for the further express and malicious purpose of harming and damaging the plaintiff's application and chances to be appointed as the United States Attorney for the Middle District of North Carolina. A copy of said letter being hereto attached and marked Plaintiff's Exhibit "B" and incorporated herein by reference.

7.

That in the letters above referred to the defendant intentionally and maliciously intended to accuse and did falsely accuse the plaintiff of the following:

- (a) violating the civil rights of various individuals while a Superior Court Judge;
- (b) unlawfully imprisoning persons while he was a Superior Court Judge;

- (c) criminal contempt;
- (d) fraud and conspiracy to commit fraud, felonies;
- (e) extortion or blackmail—felonies;
- (f) perjury and subornation of perjury—felonies;
- (g) professional misfeasance and malfeasance as a practicing attorney and as a Judge of the Superior Court of North Carolina;
- (h) violations of the Code of Ethics as promulgated and adopted by the American Bar Association, the North Carolina Bar Association and the North Carolina State Bar Association;
- (i) wrongfully withholding evidence from the Court in actions where he appeared as an attorney for one or more parties;
- (j) violating direct orders of the Court in the trial of actions in which he appeared as an attorney for one or more litigants;
- (k) violations of professional ethics and dishonesty;
- (l) of being a liar and a cheat;
- (m) denigrating the plaintiff's professional conduct as a Judge of the Superior Court and as a practicing attorney and as a person.

8.

That the accusations of the defendant against the plaintiff were made in reckless, wilful and wanton disregard of the rights of the plaintiff.

9.

That the defendant intentionally and maliciously caused the false and inflammatory accusations to be published to and among some of the highest governmental and political figures in the United States, and as a result plaintiff has suffered humiliation, embarrassment, anxiety and mental anguish, and said accusations as aforesaid were

calculated to and did injure the plaintiff in his personal life and in his profession as an attorney and counselor at law.

10.

That by reason of the aforesaid publications and false, inflammatory and libelous statements the plaintiff has suffered compensatory damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars.

11.

That by reason of the aforesaid publications and accusations made by the defendant in reckless disregard to the plaintiff's rights and without regard to the truth and with an utter lack of good faith the plaintiff is entitled to recover from the defendant punitive damages in the sum of Five Hundred Thousand (\$500,000.00) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant as follows:

(1) For compensatory damages in the sum of Five Hundred Thousand (\$500,000.00) Dollars;

(2) For punitive damages in the sum of Five Hundred Thousand (\$500,000.00) Dollars;

(3) The defendant be required to pay a reasonable amount for plaintiff's counsel fees;

(4) That the costs of this action be taxed against the defendant and for such other and further relief as the plaintiff may be entitled in law and equity.

LATHAM, WOOD AND BALOG

By /s/ B. F. Wood

Attorneys for Plaintiff

Post Office Box 226, 8 NE Court Sq.

Graham, North Carolina 27253

Telephone 919/227-2460

PLAINTIFF'S EXHIBIT A

1274 Willowgreen Ct., Westlake Village, Ca. 91361
(213) 889-1210

COLONY APARTMENTS
2111 G South Mebane Street
Burlington, NC 27215
(919) 226-4980 (Residence)
(919) 222-2718 (Office)
December 1, 1980

The Honorable Ronald Reagan
President-Elect of the United States
901 South Highland Street
Arlington, Virginia 22204

Dear Gov. Reagan:

First, as an enthusiastic, politically active American, and staunch California Republican, let me congratulate you on your victory. Please pass on a measure of these congratulations to Bill Brock who has orchestrated the election strategy for so many of our newly elected senators and representatives. Let's hope that as each victor takes his place in government that he makes every effort to discharge his duties with fitful concern and with due regard for the faith we have placed in him. It is in regard to the latter that I write you.

I am the owner of a California corporation, Colonial Pre-schools & Kindergarten, Inc., that has operated three child-care centers (920 children, \$500,000/year revenue) in the state of North Carolina since 1970.

During the years, we've become acquainted with the character and technical competence of Republican, David I. Smith, Attorney; Burlington, North Carolina. We hear political scuttlebutt to the effect that David I. Smith has

been chosen to be the best candidate to replace Mickey Michank, present Democratic appointee to the position of District Attorney, U.S. Middle District, Greensboro, North Carolina. A grave travesty of justice would take place in the event of Smith's being appointed to that position. We are totally opposed to his appointment.

David has had a very "colorful" career in law, commencing a few years back in Guilford County, N.C., when he was a state of North Carolina deputy district attorney. He gained an extremely unsavory reputation with both the court and his peers. To this day he is known as "Mad Dog" Smith because of his obstreperous conduct in the pursuit of his duties. A person well-acquainted with this aspect of Smith's conduct is James E. Pell, Esq.; Pell, Pell, Weston & John, 220 Commerce Place, Greensboro, N.C.; phone (919)379-9416.

At a hearing on November 28, 1978, in the Middle District, N.C., presided over by the Honorable Herman Amasa Smith, U.S. Magistrate, re case 11 C-79-520, David I. Smith's conduct was stated to be "the most reprehensible conduct of any attorney to come before me in my 25 years on the bench." Present at that hearing was Michael J. Lewis, Esq.; 285 Executive Park Boulevard, Winston Salem, N.C. 27103; phone (919)765-8155.

Following his terms as Deputy District Attorney in Guilford County, Smith came to Alamance County, Burlington, N.C., and set up a private law practice. He concentrated largely on divorces and "D.U.I.'s". We have three witnesses to the "fixing of a D.U.I. charge filed against Carl R. Staley, 1616 Greenwood Terrace, Burlington, N.C., for a cash payment of \$350.000. Thereafter, Staley while driving intoxicated, had a near fatal auto accident that has left him with a permanent leg disability.

Since this geographical area is now, and has been, nearly 100% Democratic, a Republican attorney is a rarity.

You may recall that for the first time in the history of North Carolina, a few years ago, they elected a Republican Governor, Jim Hulshauser. He appointed David I. Smith a temporary Superior Court Judge. In that position, Smith showed the tremendous lack of regard he has for the law, the civil rights of individuals, and our system of justice in general.

Two particular incidents involving the unlawful imprisonment of individuals are noteworthy. The individuals involved were: G.E. Roury, M.D., 1821 Hilton Road, Burlington, N.C.; phone (919) 226-9300; and Sidney Verbal, Esq.; 901 Elizabeth Avenue, Charlotte, N.C.; phone (704) 332-5044. Both incidents occurred during the temporary Superior Court term of David I. Smith and were the result of his direct act.

You will find a newspaper clipping from the Alamance News which indicates the circumstances of the summary imprisonment of Dr. G.E. Koury without resort to the subpoena power. It indicates a callous disregard for the doctor's office full of patients and his patients then in the Cardiac Care Unit at Memorial Hospital. It is unthinkable but it happened. The civil rights of both the doctor and patients were violated, and the doctor's exposure to liability was tremendous. David I. Smith must never again be permitted to achieve a dominant position in our system of justice!

In the matter of black attorney, Sidney Verbal, Esq., an equally vile action took place. David I. Smith was presiding over a case in Charlotte, N.C. and Sidney Verbal was representing one of the litigants. Verbal arrived at the hearing some 18 minutes late, was permitted no explanations, was found guilty of contempt, and summarily imprisoned in the Mecklenberg County Jail. Verbal appealed the matter in the North Carolina Circuit Court of Appeals, and the decision was reversed. A report on that case is enclosed. Once again, David I. Smith

demonstrated a total lack of regard for the civil rights of both private individuals and officers of the Court. We must be certain that such callous, obstreperous acts are never permitted to occur again as a result of David I. Smith being a judge or prosecutor.

At this time, incidents occurring in the litigation of C-75-520 in the U.S. District Court, Middle District, Greensboro, N.C., have been referred to the Honorable Benjamin H. White, Jr.; Assistant U.S. District Attorney; P.O. Box 1858, Greensboro, N.C. 27402. Our corporation alleges criminal contempt by David I. Smith in that when he was attorney for the plaintiff in the above-noted case, he did, in fact, wilfully withhold crucial evidence then in his possession that had been ordered to be produced by the court. Further, we allege conspiracy to fraud in that Smith names as a key witness to a claim of slander, wife of co-counsel, John Patterson. Smith, according to the sworn testimony of the witness, never discussed the matter with the named witnesses (Anne Patterson) nor had the witness ever met the accused defendant.

The attorneys sought some \$650,000 in damages and took the case on a contingency fee basis. Defendants, early in the case, refused to pay blackmail solicited by David I. Smith, and thereafter the crucial evidence was withheld. The corporate costs for legal fees and expenses exceeded \$75,000 and, of course, there could be no recovery through an action alleging malicious prosecution since no such abuse of action is recognized in North Carolina. Had the crucial evidence been produced when ordered, the expense would have been about \$8,000.

Prior to filing the suit, attorney for plaintiff, according to sworn testimony, stated that they "had enough on defendant R. McDonald to put him in Atlanta for life." Thereafter, throughout discovery, plaintiff's attorney never dwelt upon matters purporting to support their

client's "good faith" claims, but instead persistently interrogated in areas of defendant's alleged wrong-doing even though prohibited from doing so by a direct order of the court.

There were in excess of 70 instances of false swearing and perjury by plaintiff during discovery and the complaint was ultimately dismissed on a motion for summary judgment granted by the Honorable Eugene A. Gordon, Judge, U.S. Middle District. In dismissing the complaint, Judge Gordon stated that the case "was brought without merit and pursued in a dilatory manner causing vexation to both the defendants and the court." Additionally, he fined plaintiff \$1000 for failure to respond to discovery orders and commented that "for the most part, plaintiff's testimony was evasive, incomplete, and in some instances, untruthful."

The corporation is pursuing criminal indictment of both the attorneys and client.

In the meantime, largely as a result of our efforts, David I. Smith has not been re-appointed as a Superior Court judge by Governor Jim Hunt. Smith has returned to Burlington to pursue his D.U.I. practice. He's the only attorney advertising for business in the classified section these days. I've enclosed a copy of his latest ad.

Governor, I hope you will see fit to review these facts and weigh them as part of the decision-making process as you choose a candidate for U.S. District Attorney, Middle District. We are greatly opposed to the appointment of David I. Smith and would be willing to appear at any hearing related to the selection process. Dr. Koury, Sidney Verbal, and I want to help you resist the political pressure that might bring about this impending travesty of justice. None of us want any Watergate-type attorneys in powerful places this time.

Good luck. We're all for you.

Sincerely,

Robert McDonald /s/
ROBERT McDONALD

cc. Edwin Meese, Chairman, Transition Team
Barry M. Goldwater, Jr., (R) U.S. House of Rep-
resentatives
Jack Kemp, (R) U.S. House of Representatives

abw

PLAINTIFF'S EXHIBIT B

COLONY APARTMENTS
2111 G South Mebane Street
Burlington, NC 27215
(919) 226-4980 (Residence)
(919) 222-2718 (Office)
February 13, 1981

1274 Willowgreen Ct., Westlake Village, Ca. 91361
(213) 889-1210

The Honorable Ronald Reagan
President of the United States
White House
Washington, D.C.

Dear Mr. President:

In recent letters I have expressed continued concern regarding the candidacy of David I. Smith; Burlington, N.C., attorney, for the position of U.S. Attorney, Middle District, Greensboro, N.C. I am opposed to Smith on the basis of his failure to demonstrate the proper technical competence, respect for our system of justice, respect for the civil rights of citizens, or to possess an acceptable level of ethics, basic honesty or common sense.

Sometimes a measure of a man's qualification is the reputation he generates among his peers. An indication of Smith's reputation may be found in the attached newspaper article, "Almance Bar Association Endorses Smith for U.S. Attorney".

In essence, the Bar Association, which consists of 102 attorneys, by a vote of less than two dozen, endorsed Smith's candidacy. According to Burlington Attorney Tip Messick, the orchestration of the vote was quite typical, an 11th hour vote on a subject not on the agenda,

at a time when nearly all the opposition had left the meeting. The vote tally was 20:1 "for", with four abstentions. We feel that it is equally interesting to find that the newspaper article was published a week after the meeting took place.

There are three attorneys in Alamance County who can speak of David I. Smith's character:

Les Burke—Vernon, Vernon, and Wooten
522 South Lexington Avenue
Burlington, NC 27215
(919) 227-8851

Mr. Burke verifies that Smith is a liar.

Tip Messick—Messick, Messick, and Messick
Wachovia Building
Burlington, NC 27215
(919) 226-2436

Mr. Messick verifies unethical conduct by Smith and had filed a grievance with the North Carolina State Bar, Raleigh, N.C., in 1980.

Mitchell McIntire
103 West Elm Street
Graham, NC
(919) 228-1341

Mr. McIntire verifies that David Smith has been dishonest in a matter involving false representation of the filing of an "upset" bid in a property settlement case.

The court record in U.S. Middle District # C75-52G is replete with false statements by David Smith. You are referred to a "Motion to Continue", wherein he alleged hardship due to the fact that he was in solo practice and had to attend a conference in Houston. In fact Smith

had a partner, co-counsel John B. Patterson, who also signed the complaint. The fact that Patterson continued as counsel of record for 15 months after Smith was dismissed stands as mute evidence of Smith's lie. Additionally on the record, 12/30/75, Deposition of C. S. Richardson, Smith stated that C. S. R. had presented him with discovery per the court order of the same date, stated it was at his office, and that he would present it to counsel for defendant without further subpoena. It was never presented and delayed proceedings nearly 1½ years beyond Smith's dismissal.

The above conduct was in part that which U.S. Magistrate Herman Amassa Smith referred (11/28/78) to as "the most reprehensible conduct of any attorney appearing before me in his 25 years on the bench".

Without a doubt, David I. Smith has demonstrated that he is contemptible, a liar, and basically dishonest.

Dishonesty is so rife in our government today that the Department of Justice has had to resort to Abscam to smoke it out and prosecute it. The recent case of ex-judge Rep. R. Kelley (R) of Florida is a case in point. We do not need any more dishonest ex-judges to muddy the waters of the magnificent recovery we have achieved since Watergate.

Mr. President, I trust that you will have appropriate staff members review this problem with Senator Jesse Helms so as to avoid embarrassment to us all.

Respectfully,

/s/ Robert McDonald
ROBERT McDONALD

cc: Edwin Meese, Chief Counselor to the President
Barry Goldwater, Jr., Representative, California
Jesse Helms, Senator, North Carolina
William Webster, Director, F.B.I.

**OPINION OF THE DISTRICT COURT
(April 28, 1983)**

The opinion of the District Court for the Middle District of North Carolina is reported at 562 F. Supp. 829 (M.D.N.C. 1983), and is reprinted in the Appendix to the Petition For A Writ of Certiorari at 7a-30a.

OPINION OF THE FOURTH CIRCUIT
(July 28, 1983)

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 737 F.2d 427 (4th Cir. 1984), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at 1a-6a.

JUDGMENT OF THE FOURTH CIRCUIT
(June 28, 1984)

The judgment of the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix to the Petition for a Writ of Certiorari at 31a.